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# Knight v. State Respondent's Brief Dckt. 43042

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

RICHARD WILLIAM KNIGHT,	)	
	)	No. 43042
Petitioner-Appellant,	)	
	)	Canyon Co. Case No.
v.	)	CV-2014-4852
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
_____	)	

**BRIEF OF RESPONDENT**

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON**

**HONORABLE MOLLY J. HUSKEY**  
District Judge

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## STATEMENT OF THE CASE

### Nature of the Case

Richard W. Knight appeals from the district court's order summarily dismissing his post-conviction petition.

### Statement of Facts and Course of Proceedings

A grand jury indicted Knight on two counts of lewd conduct with a minor and one count of sex abuse of a minor. (State's Exhibit A.<sup>1</sup>) During the 2012 trial, S.B., Knight's 15-year-old grand-daughter, testified that Knight sexually abused her numerous times over several years. (State's Exhibit E, p.189, Ls.3-15; p.194, Ls.8-19; p.197, L.4 – p.224, L.11.) S.B.'s friend, 16-year-old K.B., testified that Knight sexually abused her when she and S.B. spent the night at Knight's house in August 2011. (State's Exhibit E, p.253, L.7 – p.268, L.2.) The state also submitted into evidence an audio recording of a confrontation phone call between S.B. and Knight, and audio recordings of two police interviews with Knight. (State's Exhibit F, p.153, L.16 – p.167, L.21.)

The jury found Knight guilty on all three counts. (State's Exhibit F, p.243, Ls.3-14.) The district court imposed concurrent unified 20-year sentences with 10 years fixed on both of the lewd conduct charges, and a concurrent unified 15-year sentence with five years fixed on the sex abuse charge. (State's Exhibit B.) The district court denied Knight's subsequent I.C.R. 35 motion for reduction of

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<sup>1</sup>The state attached several documents associated with Knight's underlying criminal proceeding to its Answer filed in response to Knight's post-conviction petition. (See R., p.55.) These documents are a part of the appellate record in this case.

sentence. (State's Exhibit C.) The Idaho Court of Appeals affirmed Knight's sentences on direct appeal. State v. Knight, Docket No. 40614, 2014 Unpublished Opinion No. 379 (Idaho App., February 19, 2014).

In May 2014, Knight filed a post-conviction petition. (R., pp.4-11.) The district court appointed counsel to represent Knight in the proceeding. (R., pp.47-48.) Appointed counsel filed an amended petition alleging three ineffective assistance of trial counsel claims. (R., pp.67-83.) Specifically, Knight alleged that his trial counsel was ineffective for: (1) failing to call Knight as a witness at trial; (2) inadequately cross-examining several of the state's witnesses; and (3) failing to meet with Knight prior to the sentencing hearing. (Id.)

The district court granted the state's motion for summary dismissal of the post-conviction petition. (R., pp.76-83, 168-182.) The court concluded that Knight failed to allege facts which, if true, demonstrated he was entitled to relief as to any of his claims. (Id.) Knight timely appealed. (R., pp.183-186.) The district court appointed counsel to represent Knight in his appeal (R., pp.191-193), but the Idaho Supreme Court later granted appointed counsel's motion to withdraw from the case (12/7/15 Order). Knight proceeds *pro se*.

## ISSUES

Knight states the issues on appeal as:

1. Did [the] Judge Erroneously [Deny] Petitioner's Post-Conviction Relief Petition First Claim Of Ineffective Assistance Of Counsel [sic].
2. Did [the] Judge Erroneously [Deny] Petitioner's Post-Conviction Relief Petition Second Claim Of Ineffective Assistance Of Counsel [sic].

(Appellant's brief, p.4.)

The state phrases the issue on appeal as:

Has Knight failed to show that the district court erred in summarily dismissing his post-conviction petition?

## ARGUMENT

### Knight Has Failed To Show That The District Court Erred In Summarily Dismissing His Post-Conviction Petition

#### A. Introduction

Knight contends that the district court erred in summarily dismissing two of the claims in his post-conviction petition. (See generally Appellant's brief.) Specifically, Knight contends that the district court erred by dismissing his claims that his trial counsel was ineffective for failing to call him as a witness at the trial, and for inadequately cross-examining certain state witnesses. (Appellant's brief, pp.5-8.) A review of the record reveals that Knight failed to allege facts which, if true, demonstrated he was entitled to relief as to either of these claims. Therefore, he cannot show that the district court erred.

#### B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

#### C. General Legal Standards Governing Post-Conviction Proceedings

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the



burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Also, because the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary disposition is permissible, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. State v. Yakovac, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008). That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. Id.

D. Knight Has Failed To Demonstrate He Was Entitled To Relief As To Any Of His Ineffective Assistance Of Counsel Claims

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman, 125 Idaho at 649, 873 P.2d at 903.

An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ...." Strickland, 466 U.S. at 690. To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999).

1. The District Court Properly Dismissed Knight's Claim That His Trial Counsel Was Ineffective For Advising Him Not To Testify At Trial

Knight contends that his trial counsel was ineffective for failing to call him as a witness at the jury trial. (Appellant's brief, pp.5-6; see also R., pp.68-69.)

Knight's claim fails because the allegations upon which it is based were conclusory and not adequately supported by admissible evidence.

At the hearing on the state's motion for summary dismissal, Knight's counsel clarified the scope of this claim – that Knight was alleging only that his trial counsel was ineffective for failing to call him as a witness, not that he was deprived of his constitutional right to testify. (Tr., p.6, L.21 – p.7, L.4.) The district court recognized this distinction and properly analyzed the claim pursuant to Strickland. (R., pp.173-176.)

Within the petition itself, Knight did not allege that he was prevented by his counsel from testifying, that he expressed to his counsel a desire to testify, or that his counsel misled him about his constitutional right to testify. (R., pp.68-69.) Instead, Knight acknowledged that he had pretrial discussions with his counsel about whether he should testify, and that his counsel advised him that he “should not” testify. (R., pp.68-69, 74.) In the affidavit supporting his petition, Knight alleged that he would have testified that he did not commit the crimes, that he was living in Rhode Island for approximately two and one-half years between 2007 and 2009, that S.B. hit and kicked him several times over the last several years, that he had threatened to put S.B. in juvenile detention, and that S.B. told him that she would “do something to him” if Knight followed through on the detention threat. (R., p.74.) Knight did not present any other evidence supporting these factual assertions. (See R., pp.67-83.)

The district court properly dismissed this claim. (R., pp.173-176.) The court recognized that Knight failed to present any admissible evidence indicating

that his counsel's advice that he not testify constituted deficient performance. (R., p.174.) Instead, without any allegations or evidence of coercion, or that counsel actively prevented Knight from testifying, counsel's decision to advise Knight not to testify was instead a "virtually unchallengeable" strategic decision. Knight could have chosen to decline counsel's advice and instead exercise his right to testify.

The district court also analyzed Knight's proffered testimony in the context of the testimony actually elicited at trial. (R., pp.174-176.) It is clear from the trial transcript that Knight's counsel was aware that Knight had briefly lived in Rhode Island during a portion of the time-frame of the sexual abuse, as alleged in the indictment. Knight's counsel referenced Knight's temporary Rhode Island residency in a discussion about counsel's intent to impeach S.B.'s mother. (State's Exhibit F, p.34, L.19 – p.36, L.22.) Additionally, S.B.'s mother testified that Knight lived in Rhode Island while S.B.'s father was home between tours of military duty in Iraq. (State's Exhibit F, p.55, L.18 – p.56, L.24.) Knight's counsel expressly declined to attempt to utilize this evidence for alibi purposes. (State's Exhibit F, p.34, L.19 – p.36, L.12.) The reason for this strategic decision is clear from the record. Even assuming the accuracy of the time-frame Knight alleges he was in Rhode Island (sometime between 2007 and 2009), this does not disprove the sexual abuse which was alleged to have occurred between March 2007 and August 2011. In his amended petition and supporting affidavit, Knight does not identify any specific witness testimony which would have been disproven or called into question by any additional testimony regarding Knight's

alleged residency in Rhode Island. Further, Knight's own proffered testimony indicates that he had contact with S.B. over the relevant period of time. (R., pp.74-75.)

The district court also recognized that S.B.'s "aggressive" physical conduct towards Knight and S.B.'s potential motives for fabricating her allegations were both explored by defense counsel in his cross-examination of state witnesses. (R., pp.175-176; see also State's Exhibit E, p.237, L.13 – p.238, L.15; p.242, Ls.12-22; State's Exhibit F, p.51, L.16 – p.52, L.14.) Knight's counsel also discussed the defense theories regarding S.B.'s and K.B.'s alleged motives for fabricating their allegations during his closing argument. (State's Exhibit F, p.227, L.6 – p.228, L.1.) Knight failed to make a *prima facie* showing that his counsel's strategic decision to present these defense theories to the jury through other witnesses, as opposed to through Knight himself, was based upon inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. Therefore, Knight has failed to demonstrate deficient performance. For similar reasons, Knight has also failed to demonstrate that he was prejudiced by this decision.

Because Knight failed to allege facts which, if true, would entitle him to relief on his claim that his trial counsel was ineffective for advising him not to testify, this Court should affirm the trial court's summary dismissal of this claim.

2. The District Court Properly Dismissed Knight's Claim That His Trial Counsel Was Ineffective For Conducting Inadequate Cross-Examination Of State Witnesses

Knight contends that his trial counsel was ineffective for inadequately cross-examining certain state witnesses. (Appellant's brief, pp.6-8; see also R., pp.69-70.) Knight's claim fails because the allegations upon which it is based were conclusory and not adequately supported by admissible evidence.

In his amended petition, Knight alleged that "proper" cross-examination of S.B., S.B.'s mother, and K.B. would have revealed: Knight was across the country and "incapable of committing the alleged crimes during most of the time period alleged," that S.B. and K.B. "misrepresented critical facts to the jury," that S.B. "previously repeatedly and without provocation attacked and caused harm" to Knight, and that S.B. had a motive to retaliate against Knight and to fabricate her testimony. (R., pp.69-70.) Knight did not identify specifically what facts S.B. and K.B. allegedly "misrepresented" to the jury, or what the nature of S.B.'s alleged motive to retaliate against Knight was in the context of this claim. (See R., pp.67-75.)

The district court recognized the conclusory nature of this claim and properly dismissed it. (R., pp.176-178.) As discussed above, Knight's alleged short-term residency in Rhode Island did not provide him an alibi for the charged conduct. Further, Knight's counsel engaged in significant cross-examination and recross-examination of S.B., S.B.'s mother, and K.B., and inquired about such matters as S.B.'s aggressive physical conduct towards Knight, S.B.'s potential motives to retaliate against Knight, and alleged inconsistencies contained within

the testimony of these witnesses. (State's Exhibit E, p.231, L.16 – p.242, L.24; p.249, L.20 – p.251, L.7; p.268, L.6 – p.277, L.5; State's Exhibit F, p.39, L.1 – p.41, L.2; p.45, Ls.1-18; p.50, L.7 – p.55, L.2; p.58, Ls.8-23.) Knight's counsel also discussed these matters in his closing argument. (State's Exhibit F, p.224, L.21 – p.228, L.13; p.232, Ls.15-19.)

Knight failed to make a *prima facie* showing that his counsel's strategic decisions regarding the cross-examination of state witnesses was based upon inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. Therefore, he has failed to demonstrate deficient performance. For similar reasons, Knight has also failed to demonstrate that he was prejudiced by any deficiency.

Because Knight failed to allege facts which, if true, would entitle him to relief on his claim that his trial counsel was ineffective for failing to adequately cross-examine state witnesses, this Court should affirm the trial court's summary dismissal of this claim.

### CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Knight's petition for post-conviction relief.

DATED this 6th day of April, 2016.

/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of April, 2016, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

RICHARD WILLIAM KNIGHT  
IDOC #105969  
I.S.C.I. – MEDICAL ANNEX  
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BOISE, ID 83707

/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

MWO/dd